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Supreme Court, U. S.

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No. 98-238

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

**TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER**

v.

MICHAEL GIBSON

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

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Petitioner seeks the Court's review to determine whether the Equal Employment Opportunity Commission (EEOC) has the authority to award compensatory damages against agencies of the federal government on claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Seventh Circuit held in this case that the EEOC does not possess such authority and, consequently, that respondent did not fail to exhaust administrative remedies, as required by 42 U.S.C. 2000e-16(c), when he did not request compensatory damages from his employing agency in the first instance or from the EEOC on his administrative appeal. Respondent cannot refute that the

decision of the Seventh Circuit in this case conflicts with a recent decision of the Fifth Circuit and with the EEOC's own decisions concerning the scope of its authority to order compensatory damages. The conflict has deepened since the petition was filed as a result of a new decision of the Eleventh Circuit. The frequency with which the issue is arising in the lower courts underscores the need for its prompt resolution by this Court.

1. Respondent initially contends (Br. in Opp. 2-3) that this case is an "inappropriate vehicle" to address the question presented in the petition, because "the record is unclear" as to whether he made an adequate request for compensatory damages at the administrative level. But that issue has been finally resolved against respondent. The Seventh Circuit recognized that "both parties agree that [respondent] never asked to be compensated for emotional distress, or humiliation, nor did he invoke any other term typically associated with a demand for compensatory damages" at the administrative level. Pet. App. 5a. The court thus concluded that, although "[i]t would be simpler if we could say that [respondent] put the EEOC on notice that he was seeking compensatory damages," "the record does not support it." *Ibid.* Respondent did not cross-petition on the Seventh Circuit's holding that he "fail[ed] to exhaust administrative remedies with respect to compensatory damages." *Ibid.* That holding is now the law of this case.

Respondent also asserts (Br. in Opp. 3) that the Court should not review this case because "the facts concerning the adequacy of the administrative remedy are not well developed." But the purely legal question presented in the petition—whether the EEOC has the statutory authority to award compensatory damages

against federal agencies for violations of Title VII—does not require any factual development at all. It is analytically distinct from the question alluded to by respondent concerning the EEOC's standards and procedures for awarding compensatory damages.¹

2. Respondent next contends (Br. in Opp. 3) that the conflict between the decision below and *Fitzgerald v. Secretary, United States Department of Veterans Affairs*, 121 F.3d 203 (5th Cir. 1997), is "more apparent than real," because the two cases involved different facts² and because the Seventh Circuit relied on a

¹ Respondent erroneously suggests (Br. in Opp. 1) that the government "apparently conced[ed]" in the district court that compensatory damages are not available at the administrative level. The EEOC's authority to award compensatory damages was one of many issues raised by respondent in his response to the government's motion to dismiss or for summary judgment. The government's reply brief, although not specifically addressing that issue (or certain other issues), argued that "[n]othing in [respondent's] response justifies his failure to properly exhaust his administrative remedies concerning these new claims," such as his claim for compensatory damages. Gov't Second Reply Mem. 1; see *id.* at 4 (describing respondent's new claims as including his claim for compensatory damages). No concession can properly be inferred in such circumstances. And respondent acknowledges (Br. in Opp. 1) that the government specifically argued in the court of appeals that compensatory damages are available at the administrative level. See Pet. App. 10a (court of appeals observes that the question of the EEOC's authority to award compensatory damages was fully briefed in this case).

² Respondent correctly observes (Br. in Opp. 7) that in this case his claim was decided on the merits at the administrative level, while in *Fitzgerald* the plaintiff's claim was dismissed at the administrative level because he rejected an offer of "full relief" pursuant to 29 C.F.R. 1614.107(h). But that distinction has no significance to the legal issue presented by the petition. Neither respondent nor the plaintiff in *Fitzgerald* asserted a claim for com-

rationale that the Fifth Circuit did not address.³ But those differences do not render the conflict between the legal holdings of the Fifth Circuit and the Seventh Circuit any less square.

Respondent does not, and cannot, dispute that the Fifth Circuit held in *Fitzgerald* that the EEOC possesses the statutory authority to order compensatory damages awards on Title VII claims against federal agencies, while the Seventh Circuit held in this case that the EEOC does not possess such authority. Compare *Fitzgerald*, 121 F.3d at 207 ("When a federal employee suffers harm that may be remedied by compensatory damages, it is certainly necessary and appropriate for the EEOC to grant such relief.") with Pet. App. 13a ("the EEOC may not order the government to pay compensatory damages"). As a consequence, although plaintiffs in the Fifth Circuit cannot seek compensatory damages in district court on Title VII claims against federal agencies unless they first sought compensatory damages at the administrative level, plaintiffs in the Seventh Circuit need not similarly exhaust their administrative remedies. The conflict between the decisions in this case and *Fitzgerald* was expressly noted by the Seventh Circuit. See Pet. App. 13a ("We simply conclude that Congress has determined it is inappropriate for the EEOC to order

compensatory damages at the administrative level. But both sought compensatory damages in their complaints in federal district court. The legal question whether they were required to present their compensatory damages claims at the administrative level is the same in both cases.

³ See Pet. 17-18 n.11 (discussing why the Fifth Circuit may not have addressed 42 U.S.C. 1981a(c)(1), the jury trial provision that the Seventh Circuit considered controlling).

the government to pay compensatory damages * * * *Fitzgerald* concludes otherwise."').⁴

3. The conflict has deepened with the Eleventh Circuit's recent decision in *Crawford v. Babbitt*, 148 F.3d 1318, 1324-1326 (1998), which held that the EEOC lacks the authority to award, or to order a federal agency to award, compensatory damages for Title VII violations in the federal sector.⁵ The Eleventh Circuit adopted reasoning similar to that of the Seventh Circuit in this case. Both courts held that the federal government had conditioned its waiver of sovereign immunity for compensatory damages under Title VII on the availability of a jury trial for the federal agency defendant as well as for the plaintiff. 148 F.3d at 1324; Pet. App. 11a-13a. Both courts therefore concluded that there was no waiver of sovereign immunity for compensatory damages in the administrative process, 148 F.3d at 1324-1325 (citing Seventh Circuit's decision in this case), so that a plaintiff is "not required to raise

⁴ See also *Beretta U.S.A. Corp. v. Santos*, 712 A.2d 69, 82 n.7 (Md. Ct. Spec. App. 1998) (noting that it is "unclear whether compensatory damages can be awarded by the Equal Opportunity Employment Commission under Title VII at the administrative level") (citing this case and *Fitzgerald*).

⁵ The plaintiff in *Crawford* had asserted a sexual harassment claim before her employing agency and indicated that she was seeking, *inter alia*, compensatory damages for the resulting physical and emotional problems. The employing agency concluded that the plaintiff had been a victim of sexual harassment. However, apparently because the plaintiff had offered no evidence to support her claim for compensatory damages, the agency did not award them. 148 F.3d at 1320. The plaintiff elected to file suit immediately rather than to pursue an administrative appeal to the EEOC. The district court dismissed her claim for compensatory damages on the ground that she had not adequately raised such a claim at the administrative level. *Id.* at 1323.

compensatory damages as part of her duty to exhaust administrative remedies," *id.* at 1326. And both courts acknowledged that the Fifth Circuit had reached a different result in *Fitzgerald*. *Id.* at 1325; Pet. App. 13a.⁶

The Eleventh Circuit's decision in *Crawford* provides further indication that the issue presented in the petition is an important and recurring one. The conflicting positions of the Seventh and Eleventh Circuits, on the one hand, and the Fifth Circuit and the EEOC itself, on the other, have created considerable confusion with respect to where claims for compensatory damages under Title VII against agencies of the federal government are to be raised and adjudicated.⁷ Respondent has offered no persuasive reason why that confusion should not be resolved in this case.

* * * * *

⁶ The government's petition for rehearing with suggestion of rehearing en banc in *Crawford* was denied on November 20, 1998.

⁷ As noted in the petition, the EEOC has frequently ordered compensatory damages awards against federal agencies under Title VII where (unlike in this case and *Fitzgerald*) claimants sought such damages at the administrative level and where (unlike in *Crawford*) they offered evidence to substantiate such damages. See Pet. 13 (citing *Turner v. Babbitt*, No. 1956390, 1998 WL 223578, at *5-6 (EEOC Apr. 27, 1998), which, in turn, cites several such cases); see also, *e.g.*, *Robison-Matheson v. Apfel*, No. 1961574, 1998 WL 776927, at *3-4 (EEOC Oct. 23, 1998) (citing cases); *Mares v. Peters*, No. 1962897, 1998 WL 745683, at *3-7 (EEOC Oct. 20, 1998) (citing cases). We are not aware that any statistics have been compiled on the precise number of such cases. But respondent offers no basis for his assertion (Br. in Opp. 9) that "[t]he federal district courts will not be inundated with federal EEO claims" if the EEOC cannot award compensatory damages against federal agencies and thereby resolve Title VII claims fully at the administrative level.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Solicitor General

DECEMBER 1998